

# Washington Law Review

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Volume 43  
Number 5 *Symposium on the Japanese  
Constitution*

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6-1-1968

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### Recommended Citation

Kenzo Takayanagi, *Some Reminiscences of Japan's Commission on the Constitution*, 43 Wash. L. Rev. 961 (1968).

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# SOME REMINISCENCES OF JAPAN'S COMMISSION ON THE CONSTITUTION

KENZO TAKAYANAGI\*

## INTRODUCTION

On June 11, 1956, the Commission on the Constitution was created. Its duties, as laid down by the enacting statute, were "to examine the Constitution of Japan, to investigate and deliberate on problems related thereto, and to report the results to the Cabinet and through the Cabinet to the National Diet."<sup>1</sup>

When the work of the Commission on the Constitution was approaching an end in 1964, there was informal talk about attempting an English translation of at least the Final Report. For a variety of reasons, this idea failed to materialize. However, there have been at least two excellent articles written by American scholars on the Commission.<sup>2</sup>

This paper will deal with some aspects of the Commission's work. It will also include some conclusions that I have drawn from the work of the Commission. In contrast to the well documented articles mentioned above, I have elected to write an informal essay in memoir form. First, I will describe how I came to be a member and later Chairman of the Commission. Then follows a description of the basic policies adopted by the Commission to govern the conduct of its investigations and deliberations. Some comparisons are made with the policies of the British Royal Commissions.

The major portion of my discussion will deal with the issue whether the Constitution was imposed by force upon Japan by the Allied Powers. As will be seen, I have concluded that there was no such imposition. I will explain in detail my "collaborative theory" which was presented for the first time in my *Opinions on Some Constitutional Problems*.

I will conclude with discussion of a narrow issue: that concerning Article 9 of the Constitution. It is also my view that Article 9 was

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<sup>1</sup> *Kempō chōsakaihō* (The law establishing the Commission on the Constitution) art. 2 (Law No. 140, 1956).—Ed.

<sup>2</sup> Ward, *The Commission on the Constitution and Prospects for Constitutional Change in Japan*, 24 J. ASIAN STUDIES 401-29 (1965); Maki, *The Documents of Japan's Commission on the Constitution*, 24 J. ASIAN STUDIES 475-89 (1965).

not imposed upon Japan. Finally, I will set forth my "political manifesto" interpretation of this article.

#### HOW I BECAME THE CHAIRMAN

On July 17, 1957, Mr. Ken'ichi Takeoka, Secretary General of the Commission, asked me to accept membership on the Commission. I asked him whether the Commission really intended to review the Constitution in a serious and nonpartisan spirit, or whether, as the Socialist Party charged, it was really intended to be a tool of the Liberal Democratic Party to accomplish desired constitutional revision. If the Socialists' allegation was true, I could better spend my time and energy elsewhere. Takeoka said that the investigation and deliberation would be conducted in a truly nonpartisan spirit. Perhaps he had to answer so for this was the declared policy of the statute establishing the Commission; the allegation of the Socialist Party, however plausible, was a surmise based on the political background prior to the enactment of that law. After some hesitation, I accepted Commission membership.

Some of my former colleagues at the University of Tokyo, as well as other prominent professors of public law, appear to have been similarly approached. They refused membership, probably believing that the Commission was formed to revise the Constitution, an action which they opposed. Even if they had become members of the Commission and taken a strong anti-revisionist position, they would have been outnumbered by the revisionists who commanded a majority.

I had expected to serve as an ordinary member. As it was, I was elected Chairman. When the first plenary meeting was convened on August 13, 1957, the first order of business was the selection of a chairman and two vice-chairmen. Two methods were suggested. The first provided for an election at the plenary meeting. The other provided for the formation of a selection committee which would report the results of its selection to the plenary meeting whose members would vote for or against the selection. The latter method was adopted. A selection committee consisting of five Diet members<sup>3</sup> and five nonpoliticians,<sup>4</sup> officially called "persons of learning and experience," was set up.

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<sup>3</sup>Hitoshi Ashida, Ichirō Kiyose and Iwao Yamazaki of the Lower House, and Budayū Kogure and Giichi Murakami of the Upper House.—Ed.

<sup>4</sup>Ryūgen Hosokawa, Masamichi Rōyama, Kenzō Takayanagi, Kōgorō Uyemura and Teiji Yabe.—Ed.

The Diet members voluntarily abstained from participation in the selection, and the selection of the Chairman was left entirely to the nonpoliticians of which I was a member. Teiji Yabe proposed the Masamichi Rōyama be Chairman. I fully supported this proposal. However, Rōyama refused to accept on the ground that he desired to express his own opinions, a position which would be incompatible with the chairmanship. He added that a chairman must be impartial and fair to all expressions of opinion, and a person with a judicial mind. Then my name was mentioned, and I finally accepted the offer.

The selection of the committee was reported to the plenary session and its recommendation was unanimously adopted by applause vote. Iwao Yamazaki and Teiji Yabe were similarly elected Vice-Chairmen. It was in this manner that I was selected to serve as Chairman for a period of some seven years.

#### THE POLICIES OF THE COMMISSION

As noted above, the enacting statute was little more than a general directive to investigate and report. The establishment of such a commission was not entirely unprecedented,<sup>5</sup> but it was quite unusual. In Japan, specific questions (*shimon jikō*) usually are posed for a commission with answers (*tōshin*) to be provided by it. But in this case, the directive "to report the results" did not confine the Commission to an answer to a specific question of constitutional revision; there was no *shimon jikō* or *tōshin* in the enabling statute.

The concrete organization of the investigative and deliberative process as well as the basic policies to be followed by the Commission were left entirely to the discretion of the Commission. The basic policies in the conduct of such investigations and deliberations were decided upon as early as the end of the third plenary meeting which was held on October 2, 1957; these were strictly abided by until the Commission's work was completed. The policies were as follows:<sup>6</sup>

1. All Commission meetings, except those of the steering committee, were to be open to the public.

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<sup>5</sup> Similar legislation is Law No. 281, December 24, 1949, establishing a Commission for Investigating Local Government (generally known as the Kambe Commission).

<sup>6</sup> Although the basic policies of the Commission were decided at the very beginning, the organization of its work into committees, subcommittees, sections, and so on, was not completed at the initial stages. The latter grew gradually out of practical necessity as the Commission proceeded in its work. One thing deserves mention. The designation "committee" (*inkai*) which was used in the fact-finding stage was replaced by "section" (*bukai*) when the Commission entered the stage of deliberations on policies.

Such a policy was unprecedented in the history of commissions in Japan. All of the Commission's operations thus proceeded in the public eye, not *in camera*. Leading newspapers throughout Japan assigned special reporters to attend and make reports on all Commission meetings—plenary, committee, or subcommittee. Local newspapers sent reporters to the public hearings held in their areas and the opinion of each public speaker was fully reported.

2. The stenographic notes of the Commission's proceedings were to be printed by the Printing Office of the Finance Ministry and adequate steps were to be taken to make them easily accessible to any interested person.

3. Persons who had practical experience with the Constitution, or learned scholars, whether in or out of the government, were to be called as witnesses to report their experiences or to express their opinions.

The aim of this policy was to ensure that investigation and deliberation would not be conducted by the Commission members alone but with the participation of all other qualified persons.

4. Public hearings were to be held.

The aim of this policy was to acquaint the Commission members with the practical experience and opinions of ordinary citizens.

5. In the absence of unanimity after due deliberation, the Commission was not to resort to majority rule. In such a case, the opinions of all members were to be fairly reported with a full statement of their reasons, whether these might be majority or minority opinions, whether favoring or opposing revision.<sup>7</sup>

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<sup>7</sup> Personally, I was inclined to oppose revision in the near future; but I was not opposed to "reviewing" the Constitution, and as a lawyer I was interested in listening to the arguments of the other side. As soon as I became Chairman I was loudly and vigorously denounced as the "gangleader" of the revisionists. This was a strange phenomenon, but an indication as to how the Commission was to be generally regarded by the revisionists and anti-revisionists alike. The former group was angry or disappointed because the Commission failed to recommend revision, and the latter group was placed in an awkward position because of their publicly proclaimed prophecy about the final outcome of the Commission did not come true.

Members representing the Liberal Democratic Party on the Commission were sometimes denounced by anti-revisionists as reactionary and anti-democratic simply because they advocated revision. However, as Professor Ward has stated, "A number of them were prewar liberals and men of unusual integrity and stature." Indeed, a newspaper man once came to me and said, "Don't judge the Liberal Democratic Party!" During the investigation and deliberation I observed that most of them preferred to listen and learn from what others said. They were generally less dogmatic and self assertive than some of the academic members. Because they were amenable to reason their opinions changed considerably. And because their common sense attitude prevailed the Commission was able to conduct and finish its work comparatively

This policy deviated from the usual practice of commissions in Japan or elsewhere. In the ordinary situation, the opinion of the commission is decided by majority vote or, in the case of a tie, by the chairman. In view of the composition of the Commission, resulting from the nonparticipation of the Socialist Party, it would have been nonsensical to adopt the usual majority rule and thereafter declare that the majority was in favor of constitutional revision. The adoption of a majority technique is certainly necessary for a policy-making body, but the Commission did not consider itself as such. Its function was to furnish materials for policymaking bodies. For such a purpose quality of opinions would be more important than numerical strength.

In declaring this policy, the Commission also had in view the future participation of the Socialist Party, which probably had assumed that the majority rule would be adopted and that their minority opinions would be rejected. As a matter of fact, the Socialist Party did not send members to the Commission and discouraged others from appearing as witnesses. However, eminent jurists who had refused to become Commission members, such as Professors Toshiyoshi Miyazawa, Shirō Kiyomiya and Sakae Wagatsuma, appeared before the Commission as witnesses at a later stage.

6. Fact-finding was to precede the policy discussion stage.

As a matter of fact, the fact-finding stage continued for some four years, commencing with fact-finding regarding the making of the Constitution. This mode of procedure was unusual if compared with the history of commissions in Japan. It was suggested by the practice of the British Royal Commissions. I had long felt that commissions in Japan should spend more time in fact-finding prior to the formulation of recommendations. I proposed adoption of this policy in the steering committee which readily agreed. The plenary session adopted the proposal though a minority preferred the usual method.

The British technique seemed to have two beneficial results. If members could agree on relevant facts after joint investigation, there would be a tendency to agree on policy. The fact-finding process would result, moreover, in a wealth of valuable information about actual current practice which could not be found elsewhere.

The Commission failed to fulfill this first function. Its duties covered a wide field and only a few members studied the fact-finding

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smoothly and without any disruption, despite the emotion-ridden disputes about the "imposed" constitution and the issue of constitutional revision in general.

materials with scrupulous care. The Commission, however, amply fulfilled its second function.<sup>8</sup>

The Commission considered it unwise to insist on cross-examination, a procedure which makes the facts found in the British Royal Commissions especially trustworthy. It had no power to compel witnesses to appear. It had to rely on the good will of witnesses who might otherwise have hesitated to appear if subjected to severe cross-examination. Moreover, even Japanese lawyers, who must now employ it in judicial trials, were not yet adequately trained in the art of cross-examination.

#### WAS THE CONSTITUTION IMPOSED UPON JAPAN?

In 1946, when I participated in the making of the present Constitution, I believed that it was "imposed" upon Japan. I believed that in the eyes of international law, the Instrument of Surrender was conditional, not unconditional as in the case of Germany. The allied policy of democratizing Japan, which was incorporated in the Potsdam Declaration, was accepted by Japan. There is no doubt that such acceptance was gained by the superior military force of the Allied Powers, and that such policy was "forced" upon the Japanese government. Japan also agreed that during the occupation SCAP was to be above the government of Japan, with power to order the latter to adopt legislative measures it deemed necessary or proper for democratizing Japan. I was not then aware of the Moscow Agreement of December 1945 which established the Far Eastern Commission and placed limits on the powers of SCAP, especially in regard to constitutional revision. I thought SCAP was entitled to impose any constitu-

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<sup>8</sup> Professor Ward has stated, "The enduring value of the Commission probably lies more in scholarship than in politics." Ward, *supra* note 2, at 418. And Professor Maki has said:

I am prepared to say that anyone working on either a synthetic study or a considerable array of specialized topics relating to Japanese history and society in the period between the late 1940's and the early 1960's can ignore this material at his own peril. In addition, they will be of considerable value to scholars addressing themselves to such more specialized problems as the role of the emperor, the state of fundamental human rights, virtually all issues relating to national security (not only the relatively abstract idea of renunciation of war, but the structure and role of the Self-Defense Forces and the National Security Council) and the legislative, executive, and judicial branches of government. Students of other aspects of mid-20th century Japan will find useful and stimulating, if not essential, material on a still broader range of issues including such topics as the post-1945 role of women, changes in the family system, the abolition of primogeniture and atomization of farmland ownership, problems of small and medium business enterprises, the union movement, the assumption by the government of the cost to the student of compulsory education, and juvenile delinquency.

Maki, *supra* note 2, at 487-88.

tional text upon Japan in accord with the policy of democratization.

Moreover, the Constitutional Amendment Bill placed before the Imperial Diet was accompanied by its "English translation" which was easier to understand than the text of the original. This extraordinary procedure led me to believe that the so-called English translation was actually the original. I was not then aware where the original text had been drafted.

I imagined also that the acceptance by Japan of this "imposed" Constitution might be one of the terms of the future peace treaty. So also, I believed that Article 9 was imposed upon Japan in 1946 to perpetuate the disarmament policy embodied in the Potsdam Declaration, by placing that policy in the more permanent Constitution.<sup>9</sup>

All legislation for the democratization of Japan during the occupation was guided and supervised by SCAP. No legislation was enacted by the "free will of the Japanese" in the sense that enactment was accomplished "without any outside interference." If this were the meaning of an "imposed" constitution (*oshitsuke kempō*), no one could deny it. But this kind of interference was not at issue.

The story was wide spread throughout Japan that when the SCAP draft was delivered to the Japanese government on February 13, 1946, General Whitney threatened to bring the Emperor before the International Tribunal to be tried as a war criminal if the government did not adopt the SCAP draft. If true, such pressure would certainly have amounted to *oshitsuke* (imposition by force). This story had its origin in a statement of Dr. Jōji Matsumoto, who attended a meeting with Whitney at SCAP headquarters on February 22, 1946.<sup>10</sup> I

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<sup>9</sup> However, as to the Bill's contents, I felt that it was a rather moderate revision of the Meiji Constitution along democratic lines. The position of the Emperor was retained, though so modified as to resemble the present British monarchy—a "symbolic" Head of State as expounded in Bagehot's classic work.

The "bill of rights" of the Meiji Constitution was greatly strengthened and modernized, replacing the "rule by law" of the old Constitution with "rule of law." Executive supremacy was replaced by legislative supremacy—an attainment which Japanese liberals of the 1920's had ardently desired. The judicial independence of the 1889 Constitution, an innovation adopted from the West, was to be more adequately guaranteed.

Indeed, apart from Article 9, the revision was not at all radical. It laid down a set of sound political principles which I believed could serve as the cornerstone for building a political system, assuring ordered progress. This view did not change in 1957-1964, and was elaborated further in my "Opinion on Some Constitutional Problems" presented before the plenary session in 1963. [Part of Professor Takayanagi's "Opinion" appears in this symposium, *infra* p. 979.—Ed.]

<sup>10</sup> Matsumoto was a minister of state in the Shidehara Cabinet from October 9, 1945, to April 22, 1946. He was chairman of the Investigating Committee of the Constitutional Problems established by the Cabinet on October 13, 1945. A draft con-



studied with scrupulous care the text of this statement made on July 7, 1954, at a meeting of the Constitution Investigation Committee of the Liberal Democratic Party and could not help but feel that Dr. Matsumoto's remarks on various points indicated an irrational prejudice against the SCAP lawyers.<sup>11</sup>

Shigeru Yoshida, Ichirō Shirasu, and Motokichi Hasegawa,<sup>12</sup> who, like Matsumoto, were present at the meeting on February 22, 1946, said that they did not remember Whitney ever making such a threat. If such a serious threat involving danger to the person of the Emperor was really made, they would certainly have remembered it.

Of course General Whitney himself denied ever having made such a remark, and he is fully supported by the Report to General MacArthur about the meeting in question. The Report, jointly written by SCAP officers Charles Kades, Alfred Hussey and Merle Rowell an hour or so after the meeting, was an attempt to record exactly what was said by General Whitney on this occasion.<sup>13</sup>

According to the Report, General Whitney expressly stated at the meeting that the draft was not an order by General MacArthur, but a recommendation which might or might not be adopted. As a matter of fact, General Whitney was deeply concerned whether the Japanese

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stitution proposed by Matsumoto had been rejected by SCAP on February 1, 1946.—Ed.

<sup>11</sup> See my critique of the Matsumoto statement at the 24th plenary meeting of the Commission on the Constitution which was held on December 11, 1962, in *Kempō chōsakai dai 24-kai sōkai gijiroku* (Commission on the Constitution: Minutes of the 24th plenary meeting), at 26.

<sup>12</sup> Yoshida was the Minister of Foreign Affairs in the Shidehara Cabinet when the Matsumoto draft was presented to SCAP. Shirasu was vice-director of the Bureau on Post-war Affairs (*Shūsen renraku jimukyoku*). Hasegawa was an officer from the Ministry of Foreign Affairs. [The report of the Commission on the Constitution indicates only Yoshida and Shirasu were with Matsumoto at the meeting. *Kempō chōsakai hōkokusho fuzoku bunsho* No. 2 (Report of the Commission on the Constitution, Attached Document No. 2), *KEMPŌ CHŌSAKAI, KEMPŌ SEITEI NO KEI NI KANSURU SHŌ-IINKAI HŌKOKUSHO* (Commission on the Constitution, Report of the committee relating to the history of the adoption of the Constitution) 396 (1964). But according to Tatsuo Satō, Yoshida and Hasegawa were with Matsumoto; no mention is made of Shirasu. Satō, *Nipponkoku kempō seiritsushi* (History of the formation of the Japanese Constitution), 82 *JURISUTO* 9, 13 (1955).—Ed.]

<sup>13</sup> In an article published in 1956, Professor Ward takes SCAP to task for committing outrageous acts in order to impose the SCAP draft on the Japanese government. See Ward, *The Origin of the Present Japanese Constitution*, 50 *AM. POL. SCI. REV.* 980 (1956). I understand that this charge offended General Whitney and former SCAP lawyers who claim it is totally unfounded. Professor Ward has told me that his charge was based on an article by Tatsuo Satō in *JURISUTO* which was based on the above Matsumoto statement and on no other evidence. See Satō, *Nipponkoku kempō seiritsushi* (History of the formation of the Japanese Constitution), 82 *JURISUTO* 9, 13 (1955). It was a bit humorous to watch the strongest advocate of the imposed constitution thesis repeatedly cite the Ward paper to prove it is recognized not only in Japan but internationally as well.

Cabinet would accept the recommendation; he tried to determine from Wataru Narahashi, the Minister of State and Cabinet Secretary, whether Foreign Minister Yoshida belonged to the conservative or liberal group. SCAP officers supposed that the Cabinet would resign en masse if it did not accept the SCAP recommendation, and they had discussed what measures should be taken if this happened. Indeed, General MacArthur, recollecting the state of SCAP anxiety, wrote to me on December 15, 1958: "Had the Japanese people, the Japanese Emperor and the Japanese Government not supported me as they did, the result would have been catastrophic."

In 1963, before I wrote my *Opinion on Some Constitutional Problems*, I surveyed all the evidence relating to the making of the Constitution. From this general survey emerged my "collaborative theory." I concluded that the Japanese contributions to the collaboration were as follows:

*I. Before the SCAP draft was proposed:*

1. Article 9 had its origin in Tokyo, not in Washington. The idea was first suggested by Prime Minister Shidehara, not by General MacArthur.

2. Washington left the question of abolishing or retaining the position of the Emperor to the Japanese. Shidehara requested MacArthur to do his best to retain the system, and when MacArthur ordered the Government Section to write a SCAP draft, he chose to retain it. Although he made the choice at the ardent request of Shidehara and others, MacArthur himself absolutely agreed with Shidehara on this question. He has stated:<sup>14</sup>

The preservation of the emperor system was my fixed idea. It was inherent and integral to Japanese political and cultural survival. The vicious efforts to destroy the person of the emperor and thereby abolish the system became one of the most dangerous menaces that threatened the successful rehabilitation of the nation.

*II. After the delivery of the SCAP draft to the Japanese Government:*

1. After much discussion, the Cabinet adopted MacArthur's recommendation that a Government Bill be drafted with the SCAP

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<sup>14</sup> Letter from General MacArthur to the author, then Chairman of the Commission on the Constitution, printed in KEMPŌ CHŌSAKAI, KEMPŌ CHŌSAKAI HŌKOKUSHO (Report of the Commission on the Constitution) 115 (1964), and KEMPŌ CHŌSAKAI HŌKOKUSHO JIZOKU BUNSHO No. 2 (Report of the Commission on the Constitution, Attached Document No. 2) KEMPŌ CHŌSAKAI, KEMPŌ SEITEI NO KEII NI KANSURU SHŌ-IN KAI HŌKOKUSHO (Commission on the Constitution, Report of the committee relating to the history of the adoption of the Constitution) 314-17 (1964).

draft as a model. MacArthur told Shidehara in an interview on February 21, 1956, that the most important part of the SCAP draft was the chapters on the Emperor and the renunciation of war and that other parts could be fully discussed by Japanese and American lawyers. It was so reported at the Cabinet meeting. The Japanese Government Draft Bill deviated from the SCAP draft on a few points, but for the most part it was a literal translation of the latter. SCAP did not request that the Draft Bill take this form; the Japanese government simply chose the easiest way.

2. Legislation enacted during the occupation for the democratization of Japan may be roughly classified into three categories:

(a) Legislation based on SCAP orders, such as the *Shintō* Order, where there was no room for any Japanese contribution.

(b) Legislation based on drafts made by the Japanese government, reviewed and approved by SCAP, such as that revising the Civil Code.

(c) Drafts made by SCAP but amended by the Japanese government or the National Diet, such as the Anti-Monopoly and Labor legislation and the amendment to the Commercial Code. Here revision of SCAP drafts was allowed if considered reasonable and proper by SCAP. Thus, room was left for Japanese contributions. As chairman of the Commercial Law Division of the Legislative Council (*Hōsei shingi-kai*), I witnessed the process of discussion. I remember that through discussion with SCAP lawyers I succeeded in having the SCAP drafts altered to no small extent.

For the drafting of the new Constitution, Washington desired the use of method (b) and SCAP followed this policy until the beginning of February 1946. With the rejection of the "Matsumoto Draft" and the preparation of the SCAP draft by order of MacArthur, a shift was made to method (c). Here SCAP was willing to listen to Japanese opinions. At a meeting of the leading members of the House of Peers and SCAP lawyers at the official residence of the President of the House of Peers, I heard Kades say, "We are rather sorry that more proposals for amendment have not been made in the Diet."

I was a member of the House of Peers at this time. A personal experience will serve to illustrate that method (c) was actually used. I thought that the chapter on the Emperor was rather poorly drafted, so that it might possibly create an awkward diplomatic situation. So I went to see an officer in the Government Section, who had studied at

Harvard Law School, as I had. We discussed in a friendly way and on perfectly equal footing my proposal for amendment, written both in English and Japanese. I asked him would it not be true that if the President of the United States were to send an ambassador to Japan, his credentials would be addressed to the Emperor, the Head of State under the Bill as drawn? He agreed. I then pointed out that under the Bill as drawn, should Japan send an ambassador to the United States his credentials would be in the name of the Prime Minister, not the Emperor who merely "attested" to the credentials. Would it not be deviating, without any practical necessity, from the diplomatic practice that the credentials of diplomatic envoys be addressed from Head of State to Head of State? My friend agreed. I suggested that the Emperor be empowered, with the consent and approval of the Cabinet, to issue credentials; that this amendment would comply with usual diplomatic practice without contravening the basic policy of the Bill since it would not increase the political power of the Emperor in any way. My friend personally agreed with me, but had to consult with his colleagues.

A few days later I was told that if the House of Peers adopted my proposed amendment, SCAP had no objection. So in the joint names of Dr. Saburō Yamada, my teacher, and myself, the proposed amendment was presented before the House. Tokujirō Kanamori<sup>15</sup> opposed our proposal with unusual eloquence; and since the chief government spokesman opposed the amendment, many members of the Upper House apparently supposed that it represented the intention of SCAP. The proposal was rejected by the House by a majority vote. Thus the present Constitution remained unamended, and my own attempted contribution failed to bear fruit.<sup>16</sup>

My theory of collaboration resulted from a survey of evidence such as that mentioned above. Justice Tsuyoshi Mano of the Supreme

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<sup>15</sup> Kanamori, a former Director of the Bureau of Legislation, became counsel to the Shidehara Cabinet on March 26, 1946. He was later appointed the minister of state in charge of constitutional problems on June 19, 1949. He held this position as a member of the Yoshida Cabinet which succeeded the Shidehara Cabinet on May 22, 1946 following the general election of April 10. He was commonly called "the Constitutional Minister of State."—Ed.

<sup>16</sup> Before the vote, Shidehara came to my office and stated that he entirely approved of our proposed amendment; but since Kanamori threatened to resign if the government did not support him, and the Cabinet could not dispense with this highly efficient official, the government had to oppose the amendment. Shidehara, therefore, wished to have the amendment proposal withdrawn. I consulted with Yamada who insisted that the proposal not be withdrawn, even though it would be defeated. We understood the Prime Minister's awkward position, but refused to follow his advice.

Court, supported my analysis and cited further examples of Japanese contributions. Most Commission members did not oppose my analysis, although they kept silent, and of course no vote was taken. The opposition expressed was largely linguistic, for example, whether the word "*gassaku*" (joint-work) was appropriate. Opponents felt that there could not be any *gassaku* between a superior and a subordinate. I used the word on the assumption that in intellectual matters the word "*gassaku*" could properly be employed even as between the superior and the inferior in rank. An essay published in the joint names of a professor and his pupil might be called *gassaku* if both collaborated in its preparation. However, I did not succeed in persuading opposing members.

Moreover, political considerations were involved. "*Oshitsuke*" (imposition by force) was a frequently employed and valuable slogan for stimulating national sentiment for constitutional amendment. If *gassaku* became the dominant view, it would deprive the revisionists of one of the most effective weapons in their armory. The vehemence with which the *gassaku* theory was opposed by a few of the members might be accounted for by this very fact.

Subsequently, opposition from another quarter appeared. While admitting that the analysis was correct, so far as the role of SCAP was concerned, some opponents asserted that there was no distinction between an "order" and a "recommendation." I am skeptical about this view, based solely on authoritarian conceptions, which ignores the rational considerations which prevailed when discussion was conducted between SCAP officers and Japanese lawyers.

However, there is this much truth in the authoritarian view: Not only was there a language barrier; there existed also the barrier between lawyers trained in the common law and lawyers trained in the civil law. There was not one lawyer in the Government Section nor among Japanese negotiators who had mastered the "two ways of thinking" as had Lord MacMillan, John H. Wigmore, or Roscoe Pound. The Japanese lawyers who tried to influence the occupation lawyers had to present their opinions according to the common law way of thinking. If they employed a civilian's logic in English translation, it was not well understood and was in danger of being rejected. The final say was after all in the SCAP officers. Under such circumstances the Japanese lawyers might well have felt that SCAP "imposed" its views on them, disregarding their own which they believed to be correct.

## MY "POLITICAL MANIFESTO" INTERPRETATION OF ARTICLE NINE

Article 9 states:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

2. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

In 1946, I believed that Article 9 was imposed on Japan in order to perpetuate the disarmament policy embodied in the Potsdam Declaration by placing that policy in the more permanent Constitution. But after making a survey of the evidence of which I was totally ignorant in 1946, I later found my belief to be completely erroneous.

While I felt that on the whole the Government Bill was moderate, Article 9 struck me as a bit too radical. At a meeting of the Special Committee on the Constitution, I put a series of questions to Tokujirō Kanamori, the government spokesman, on the possible implications of Article 9. I did this in order to ascertain what was the official interpretation of the Article. I gathered from his replies that the official interpretation was that Japan retained a right of national self-defense in international law, but by virtue of the second paragraph, she could neither wage war nor maintain an armed force—even for purposes of national self-defense. I felt dubious about this explanation. In effect, it was superficial and unrealistic. However, on the assumption that this was its meaning, I stated at a plenary session that Article 9 would be reasonable only when a world authority came into being which could guarantee the security of each nation. I expressed my ardent desire that such an authority might emerge as early as possible.

The official governmental interpretation was adopted by leading professors of constitutional law and it gradually became *communis opinio doctorum* (I once characterized it as *communis error doctorum*). It was so taught not only in university law schools but also in civic education in junior and senior high schools. Under this interpretation Article 9 was well received by the general public, and the Constitution has been termed the "peace constitution." The doctrine of *communis opinio doctorum* seemed to be welcomed by popular sentiment rather than by reason.

When the constitutionality of the Self-Defense Forces Law<sup>17</sup> was hotly discussed in the National Diet and the press, the constitutional lawyers who had adopted the official interpretation in their commentaries and text books concluded that the law was unconstitutional. Lawyers of the Cabinet Bureau of Legislation also followed the official interpretation, but evaded its logical consequence by the use of legal fictions—a technique well-known to the old Roman law as well as the common law. But the ordinary citizen did not understand; the government was attacked for its audacity in subverting the Constitution by telling “lies” palpable to all.

In 1953 a meeting was held at the University of Tokyo to hear both sides in the heated dispute relating to the constitutionality of the Self-Defense Forces Law. Hitoshi Ashida, who had been the Chairman of the Special Committee on the Constitution of the House of Representatives, and I were called to defend the very unpopular thesis that the law was constitutional.

Ashida had rewritten Article 9 in the Lower House so as to make possible at some future time the interpretation that it does not apply in the case of national self-defense and international sanction. He had in mind a similar interpretation of the Kellogg Pact.<sup>18</sup> When he expressed his view that the Self-Defense Forces Law was not unconstitutional, a few commentators charged that he was a turncoat. It was alleged that he had changed his own interpretation, originally the same as the official one, expressed at the plenary session of the Lower House. The falsity of this charge is proved by a pamphlet entitled *Interpretation of the New Constitution (Shin kempō no kaishaku)* published as early as October 1946, in which Ashida set forth an interpretation entirely different from the official one, though he did not expressly refer to the second paragraph of Article 9.

I had made some comments critical of the official interpretation of Article 9 in the House of Peers. At the Tokyo University meeting I took a bolder position, asserting that the official interpretation was totally wrong. I agreed with Ashida that Article 9 did not apply in the case of national self-defense. Ashida relied chiefly on the wording of the text which he had written and which was susceptible to two irreconcilably antagonistic interpretations. Adopting the sociological method of constitutional interpretation, similar to Brandeis' use of

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<sup>17</sup> *Jieitaihō* (Self-defense forces law) (Law No. 165, 1954).

<sup>18</sup> Briand-Kellogg Pact, Aug. 27, 1928.

sociological brief in *Muller v. Oregon*,<sup>19</sup> I declared that Article 9 was in the nature of a political manifesto addressed to the world as well as the nation—even though it was found in the body of the Constitution and not the Preamble.<sup>20</sup> If the Article were interpreted as a political manifesto and not as an ordinary legal provision, the National Diet might or might not retain armed forces for defensive purposes. This, being a realistic political question to be discussed against the background of the actual situation prevailing among nations, is not really a constitutional question. This method of interpretation was adopted by me in the spirit of Chief Justice Marshall who warned American lawyers not to forget that it was a “constitution”—not a commercial law or the terms of a lease—that they were expounding.

This, however, is not to deprive the Article of its high importance. It is a manifesto with an eye to the future welfare of mankind. Article 9 does not indeed enjoin the National Diet, making Japan a lamb in the company of wolves. The manifesto is a world ideal which cannot be realized by Japan alone, but only by the joint endeavors of all nations.

<sup>19</sup> 208 U.S. 412 (1908).

<sup>20</sup> In this connection it is interesting to note the following dialogue between Dr. Matsumoto and General Whitney at a meeting held on February 22, 1946:

*Matsumoto*: Might the Renunciation of War be inserted somewhere in the Preamble, rather than be given a chapter of its own?

*General Whitney*: The Renunciation of War was placed deliberately in a separate chapter in order to give all the emphasis possible to this important article. As I stated to Mr. Yoshida, and the Supreme Commander stated to Shidehara yesterday, this article affords Japan the opportunity to assume the moral leadership of the world in the movement toward lasting peace. The Renunciation of War should not be buried amongst the enunciation of other principles; rather, it must be stated boldly in order to serve its full purpose. General MacArthur feels that this principle will do more to attract the favorable attention of the world than anything else. And this is a time in which Japan needs the favorable attention of the world.

*Matsumoto*: It would be less unsuitable if it were written in the Preamble. It is unusual to have this principle stated in the body of the Constitution rather than in the Preamble.

*Commander Hussey*: You mean, Dr. Matsumoto, that you would prefer to have it stated merely as a principle?

*Matsumoto*: Yes, that is so.

*Commander Hussey*: While we appreciate that position, we feel that the renunciation should be incorporated in the basic law itself, that this would give it real force.

*General Whitney*: The enunciation of this principle should be unusual and dramatic. We made it Chapter II rather than Chapter I of the Constitution in deference to the emperor and his place in the hearts of the Japanese people. For my own part, and in terms of its decisive importance, I would prefer the Renunciation of War to be Chapter I of the new Constitution.

[As to who were the Japanese participants at this meeting, see note 12, *supra*. See *Kempō chōsakai hōkokusho fuzoku bunsho* No. 2 (Report of the Commission on the Constitution, Attached Document No. 2) *KEMPŌ CHŌSAKAI, KEMPŌ SEITEI NO KEII NI KANSURU SHŌ IINKAI HŌKOKUSHO* (Commission on the Constitution, Report of the committee relating to the history of the adoption of the Constitution) 369-71 (1964), for a description of the other topics discussed at the meeting.—Ed.]



Such were the ideas underlying my "political manifesto" interpretation of Article 9. This "double-tracked" theory, which took account of ideals as well as reality, was not acceptable to jurists who thought that the method of interpreting the Commercial Code and the Constitution must be identical. For them the literal interpretation of the text was the only way of protecting the Constitution.

Nonetheless, as noted above, before the Commission began its studies on the making of the Constitution, I believed Article 9 was imposed upon Japan. I no longer hold that view.

SWNCC 228<sup>21</sup> clearly indicated that the American Government had no intention of imposing Article 9 on Japan. Its origin was in Tokyo, not in Washington. It originated in an interview between MacArthur and Shidehara on January 24, 1946. It was believed even by persons officially closest to Shidehara that he visited MacArthur merely to express his thanks for the penicillin which had been procured by the General for the Prime Minister. But in fact Shidehara requested the interview in connection with the forthcoming Constitution.

No one else was present at the interview which continued for some three hours. Shidehara astonished the General with a proposal for the insertion of a renunciation-of-war and disarmament clause into the new Constitution. Apparently the General hesitated at first because of the possible deleterious effects on United States foreign policy in Eastern Asia, if the proposal were approved. The Prime Minister, however, succeeded in persuading the General that in the atomic age the survival of mankind should precede all national strategies; that if an atomic war should break out, America herself might be destroyed; that other nations must follow the same principle of renouncing war if they themselves were to survive. MacArthur was deeply impressed by this part of Shidehara's argument. Before the SCAP draft and the Japanese Government Bill were drawn, the General and the Prime Minister agreed to insert such a clause in the new Constitution.

The original draft of Article 9 was made by MacArthur himself

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<sup>21</sup> SWNCC The State-War-Navy Coordinating Committee Document No. 228. This report, entitled *Reform of the Japanese Government System*, was approved by SWNCC on January 7, 1946. It was forwarded to General MacArthur, Commander in Chief, U.S. Armed Forces, Pacific, for his "information" on January 11, 1946. The full text is found in *Kempō chōsakai hōkokusho fuzoku bunsho* No. 2 (Report of the Commission on the Constitution, Attached Document No. 2) KEMPŌ CHŌSAKAI, KEMPŌ SEITEI NO KEII NI KANSURU SHŌ-INKAI HŌKOKUSHO (Commission on the Constitution, Report of the committee relating to the history of the adoption of the Constitution) 677 (1964). A summary is printed in *THE FAR EASTERN COMMISSION, A STUDY IN INTERNATIONAL COOPERATION, 1945 to 1952* (Dep't of State Pub. 5138), at 45.—Ed.

based on the conversation of January 24 before he ordered the Government Section to draw up a Model Draft. MacArthur's original draft was revised by lawyers of the Government Section, notably by striking out the phrase "even for self preservation."<sup>22</sup> The SCAP draft which included this revised text of Article 9 was handed over, with MacArthur's approval, to the Japanese Government on February 13, 1946.

This picture emerged after I made a survey of all the relevant evidence. If this general picture is true, can it be said that Article 9 was "imposed" on Japan? I gave up the belief that I had entertained in 1946.

Before Shidehara talked with MacArthur on January 24, 1946, he had not consulted with anyone, including his Foreign Minister, Shigeru Yoshida. At a Cabinet meeting on February 22, reporting the results of his interview with MacArthur on the previous day, Shidehara behaved as if Article 9 were proposed by MacArthur, although he never clearly said so. If he had said that the proposal was his and not MacArthur's, it might have been rejected by the Cabinet. Shidehara was diplomatic enough to know this. So Cabinet members who attended the meeting, including Yoshida and Ashida, thought that the proposal was made by MacArthur and not by Shidehara. After this meeting, Shidehara told a number of his close friends that "Article 9 did not come from abroad" and that it was his own proposal. Neither Yoshida nor Ashida was aware that the original proposal was made by Shidehara. They thought, as I did at the time, that it was "imposed" by the Allied Powers. These events account for the difference between Ashida's public statement at the plenary session and his private opinion in his pamphlet, and Yoshida's written memorandum sent to the Commission on the Constitution which denied that the Article was Shidehara's.

In a letter of December 1, 1958, I stated to MacArthur:<sup>23</sup>

As for the much talked about Article 9, I understand General MacArthur, as well as Baron Shidehara, was thinking not only in terms of a basic Japanese policy but in terms of the shape of things which ought to come in the world at large. Article 9 of the Japanese Constitution should

<sup>22</sup> *Kempō chōsaki hokokusho fuzoku bunsho* No. 2 (Report of the Commission on the Constitution, Attached Document No. 2) KEMPŌ CHŌSAKI, KEMPŌ SEITEI NO KEI NI KANSURU SHŌ-IN KAI HOKOKUSHO (Commission on the Constitution, Report of the committee relating to the history of the adoption of the Constitution) 322 (1964).—Ed.

<sup>23</sup> For differing views as to who proposed Article 9, see *id.* at 323-38.—Ed.

serve as a model for the future constitution of every country in the world. Otherwise mankind may perish in this atomic era.

In reply, MacArthur wrote to me on December 5, 1958:<sup>24</sup>

Your impressions are correct. Nothing in Article 9 prevents any and all necessary steps for the preservation of the safety of the nation. I stated this at the time of the adoption of the Constitution and later recommended a Defense Force be organized of ten divisions with corresponding elements of the sea and air forces. The article was aimed entirely at foreign aggression and was to give spiritual leadership to the world. It will stand everlastingly as a monument to the foresight, the statesmanship and the wisdom of Prime Minister Shidehara.

It is clear from the above that MacArthur's interpretations of Article 9 is antagonistic to the official Japanese interpretation as stated by Kanamori at the Imperial Diet. MacArthur's interpretation accidentally agrees with my own, arrived at quite independently without any knowledge of the SCAP view.

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<sup>24</sup> *Id.* at 321.—Ed.